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IN THE

SUPREME COURT OF THE UNITED STATES

No. 666

J. TURNER BUTLER & WILLIAM A. HALLOWES,
As Trustees of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation,
Petitioners,

vs.

WILLIAM ALEXANDER WATTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

J. Turner Butler and William A. Hallowes, as Trustees of the property of Florida East Coast Railway Company, a corporation, pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled action on May 20, 1958, affirming a judgment for $80,000 recovered by the Respondent.

PROCEEDINGS BELOW.

The opinion of the District Court of Appeal of Florida, Third District, is reported in 103 So. 2d 123. A copy of this opinion is set out in Appendix B of this petition and a copy of the judgment of the court in Appendix C.

The order of the Supreme Court of Florida denying petition for writ of certiorari is reported in 106 So. 2d 200 (Advance Opinion). A copy of the order of the Supreme Court of Florida is set out in Appendix D.

JURISDICTION.

The judgment of the District Court of Appeal of Florida, Third District, was entered on May 20, 1958. The order of the Supreme Court of Florida denying petition for writ of certiorari was entered on October 28, 1958.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED.

I. WHETHER OR NOT IN AN ACTION BROUGHT UNDER THE FEDERAL EMPLOYERS LIABILITY ACT WHERE THERE WAS EVIDENCE FROM WHICH THE JURY COULD HAVE FOUND THE PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH WOULD RESULT IN DIMINISHING ANY DAMAGES RECOVERED BY HIM THE TRIAL JUDGE ERRED AND DENIED PETITIONER THE RIGHT TO TRIAL BY JURY ON THAT ISSUE IN INSTRUCTING THE JURY AS FOLLOWS:

> "In this case what is known as the law of comparative negligence applies. Thus the fact that

the plaintiff may have been guilty of contributory negligence, if you should find that he was, will not prevent him from recovering if you also find that the defendant is guilty of negligence."

II. WHETHER OR NOT IN AN ACTION BROUGHT UNDER THE FEDERAL EMPLOYERS LIABILITY ACT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF RELEASE AS FOLLOWS:

"Therefore, the first issue for you to decide in this case concerns the question of the release. In determining this issue, you may consider,

1. The mental condition of Mr. Watts at the time the release was signed.

If you find from the evidence that his mental condition was such that he did not understand the nature and effect of signing such release, then the release is not valid and should be set aside as it is not binding on him.

2. Whether or not there was a misrepresentation of the facts.

3. Whether there was a meeting of the minds of Mr. Watts and the railroad, acting through its Claim Agent, or whether there was a mistake of fact that presented [*sic*] a meeting of the mind.

4. Whether or not the Railroad, through its Claim Agent, had superior knowledge and thus acquired undue advantage due to such superior knowledge, and whether or not the parties were standing upon equal footing in the negotiation.

5. Whether or not the alleged release was obtained through fraud on the part of the railroad, or its agents or employees. Fraud could be an attempt to mislead or misrepresent the actual terms

of the release, and to attempt to convince Mr. Watts that his future employment was protected. Fraud can likewise be present without finding any conscious bad faith on the part of Mr. Paffe in this transaction, if you believe from the evidence the railroad obtained this release through an undue advantage or that the parties were not standing upon an equal footing in this transaction.

6. If you find from the evidence that the consideration of money given by the Railroad for this release was so grossly inadequate, in view of the injuries sustained, or so inadequate as to shock the conscience or the moral sense of right and wrong, you may take this into consideration in determining if any fraud was present.

7. That the parties were mistaken as to the terms of the release, or that Mr. Watts was mistaken as to Mr. Paffe's intentions and understanding of this release, or that both parties were mistaken as to its understandings.

If you find that any one or all of the conditions enumerated above have been proven by a preponderance of the evidence to have existed at the time this release was executed or signed, you should find for Mr. Watts on this issue, and then turn to the question of negligence on the part of the railroad."

STATUTES INVOLVED.

Title 45, United States Code, Section 51.
Title 45, United States Code, Section 53.
A full text of these sections is set out in Appendix A.

STATEMENT.

William A. Watts sued the then Trustee of the Florida East Coast Railway Company, John W. Martin, for injuries received by him while he was employed as a boilermaker. Watts was severely burned while repairing the water tank of a locomotive. The general theory of plaintiff's case was that the defendant failed to exercise reasonable care in providing him with a safe place to work (R. 1-3).

In his answer defendant denied that he was negligent and pleaded a separate defense of release, claiming that for a total consideration of $6,116.26 plaintiff had released all claims he had arising out of the particular accident (R. 5-6).

The issues of release and liability were tried at the same time.

Watts admitted signing the release but claimed that he was not mentally competent at the time he did it.

There was evidence at the trial from which the jury could have found that while Watts was not legally incompetent on the day he signed the release he was not fully competent to execute it or to understand the consequences of it (R. 302, 303). There was other evidence, some of it from Watts himself, tending to show he was competent and did understand that he was signing a release (R. 437, 474, 346-348, 626).

Watts also claimed that he understood from a letter that was read to him shortly before he signed the release that when he returned to work he would go back at light duty and be protected on the job (R. 435). Nothing was said to him other than reading the letter (R. 473).

The pertinent part of the letter provided:

> "We have considerable light or bench work which our Boilermakers are required to do and it is our plan to assign Mr. Watts to these duties when he returns and keep him on this job until he fully recovers." (R. 331).

Watts testified that he read the release before he signed it (R. 437, 474). He had signed a similar form of release for another personal injury claim several years before (R. 449-450). Watts knew at the time he signed the release that all jobs in the railroad yards where he worked were union jobs and subject to seniority (R. 438, 446). He did not understand that he would always have a boilermaker's job (R. 438). He knew that he could be cut off at any time on a seniority basis (R. 475).

It was with this background that the charge on release was given.

On the issue of liability, there was evidence from which the jury could have found that the defendant trustee was negligent. The plaintiff introduced expert testimony tending to show that the fire in the water tank was caused by an oxygen and/or acetylene leak in Watts' welding torch by grease and/or oil in the tank, or by a combination of these factors (R. 526, 527, 530).

The same expert discussed the need for ventilation in the tank (R. 510-516, 527), stating that an exhaust fan was best, but that an air hose which he deemed unsatisfactory should be used rather than nothing (R. 510).

There was also testimony from which the jury could have found Watts guilty of contributory negligence which would reduce any recovery by him under the comparative negligence doctrine embodied in Title 45, United States Code, Section 53.

Evidence from several witnesses showed that Watts had not used the air hose that was available to him to ventilate or blow smoke out of the tank (R. 668, 670, 673, 692). Other tanks had previously been repaired in the same way and there had been no accidents before (R. 625, 467).

In addition, there was testimony that Watts stopped welding at one point, got out of the tank, then got back in and resumed welding although there had not been time for the tank to air out and it was filled with smoke (R. 463). No one was crowding him to complete the job (R. 463).

As to the possibility of oil in the tank causing or contributing to the fire, there was evidence from which the jury could have found that Watts himself (R. 649, 656, 456-457, 666-667) caused the oil if there was any, to be in the tank. Oil in the tank was one of the possibilities suggested by the welding expert as a cause of the fire.

This evidence notwithstanding, the trial court in his charge told the jury to disregard any evidence of contributory negligence by Watts.

FEDERAL QUESTION RAISED.

The questions presented involve, of course, the interpretation of a federal statute.

The first question upon which we seek review—that of the court's charge to the jury on the issue of comparative negligence—was raised by exceptions to the charge (R. 739, 829-830); by Motion for New Trial (R. 182-185); and by Assignments of Error (R. 835-839).

The exceptions were noted by the trial judge (R. 739, 829-830), and the Motion for New Trial denied (R. 191). The District Court of Appeal, of Florida, Third District, affirmed the judgment. In its opinion it stated that the charge was error but that despite defendant excepting on two occasions he did not sufficiently "press the point" and so the question was not preserved for review.

The second question upon which we seek review—that of the instruction to the jury on the question of release—was raised by objection and exception to parts of the charge (R. 718-728, 739, 829-830), by Motion for New Trial (R. 182-185) and by Assignment of Error (R. 835-839).

The trial court noted the exceptions (R. 729, 829-830) and denied the Motion for New Trial (R. 191). The District Court of Appeal of Florida, Third District, affirmed the judgment.

Excerpts from the proceedings referred to are set out in Appendix E.

ARGUMENT.

POINT ONE.

The Court's Instruction on Comparative Negligence.

At the conference on charges, Defendant's Requested Charge No. 20 was first submitted in the following form:

> "In this case, what is known as the law of comparative negligence applies. Thus the fact that the plaintiff may have been guilty of contributory negligence, if you should find that he was, will not prevent him from recovering if you also find that the defendant was guilty of negligence proximately resulting in the injuries complained of. However, you must reduce

any award you may make by the amount that the negligence, if any, of the plaintiff contributed to his injury." (R. 174, 737, 738).

Defendant amended the charge so that it read as follows:

> "In this case, what is known as the law of comparative negligence applies. Thus the fact that the plaintiff may have been guilty of contributory negligence, if you should find that he was, will not prevent him from recovering if you also find that the defendant was guilty of negligence. However, you must reduce any award you may make by the amount that the negligence, if any, of the plaintiff contributed to his injury." (R. 737-738).

In other words, the language "proximately resulting in the injuries complained of" was deleted. The trial judge stated that he would give the charge as amended (R. 738).

At the conclusion of the conference on charges, the judge himself noted in the record exceptions by both parties to all charges given other than those requested by each party and to all charges requested and refused (R. 739).

When the judge charged the jury, the last sentence of Charge No. 20 was omitted, (R. 823). This omission completely altered the meaning of the instruction, changing it from a standard instruction on the comparative negligence doctrine to a peremptory instruction to ignore any evidence of contributory negligence on the part of Watts. It amounted to a directed verdict on this issue and withdrew the question from the jury.

Counsel for the defendant called to the judge's attention the alteration in the charge. The judge reiterated

that he had already noted exceptions that would preserve for both parties any objections to charges. Counsel stated further to the court that he wished to make it clear that in amending Charge No. 20 he had meant to leave in the last sentence (R. 829-830). The judge indicated that he understood this (R. 830).

Despite the fact that exceptions to charges were twice noted and then further objection made which the trial judge said he understood, the District Court of Appeal of Florida, Third District, said the question was not preserved for review because counsel did not "press" the point.

It admitted it knew of no precedent for any such holding (Appendix B).

The effect of the ruling on this instruction was to deny petitioner the right to jury trial on an important issue in the case. By telling the jury to disregard any evidence of Watts' negligence, the court in effect directed a verdict for him on this issue.

It has long been established that federal rights cannot be defeated in the name of local practice. *Davis v. Wechsler*, (1923) 263 U. S. 22. This rule has been followed in cases arising under the Federal Employers Liability Act.

In *Brown* v. *Western Ry. of Alabama*, (1949) 338 U. S. 294, this Court held that a complaint was sufficient to state a cause of action although it had been held defective by the state courts of Georgia.

This Court in *Urie* v. *Thompson*, (1949) 337 U. S. 163, passed on a question of state pleading in Missouri (337 U. S., p. 179, Fn. 17), holding that it was not in accord with the applicable federal standards in such cases.

In *Arnold v. Panhandle & Santa Fe Railway Company*, (1957) 353 U. S. 360, this Court discussed a Texas procedural rule that findings on special issues were controlling over an inconsistent general verdict. In reversing, this Court again stressed that "assertion of federal rights, when plainly and reasonably made, is not to be defeated in the name of local practice".

See also, *El Paso & N. E. R. Co. v. Gutierrez*, (1909) 215 U. S. 87, where a requirement of the territory of New Mexico that notice of claim be served as a condition precedent to filing suit was held inapplicable in an action under the Federal Employers Liability Act.

The right to trial by jury on all issues in FELA actions has been zealously protected by this Court. In the present case, the right was denied on an all-important issue.

Exceptions were noted on two occasions. The trial judge clearly thought and indicated that exceptions were preserved on all charges. Yet the appellate court said something more should have been done, the point should have been pressed. How this could have been done any more than it was we do not know and the court did not indicate.[1]

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[1]Rule 2.6(b), Florida Rules of Civil Procedure, provides: "Not later than at the close of the evidence, or at such earlier time during the trial as the court may reasonably direct, it shall be the duty of the parties to the cause to file written requests that the court charge the jury on the law as set forth in such requests. The court shall then require counsel to appear before it for the purpose of a conference to settle the charges to be given. At such conference all objections shall be made and ruled upon and the court shall likewise inform counsel at said conference of such general charges as it will give. No party may assign as error the giving of any charge unless he objects thereto at such time, nor the failure to give any charge unless he shall have requested the same. The court shall charge the jury after the arguments are completed." (Footnote continued on page 12).

POINT II.

The Charge on Release.

In *Callen* v. *Pennsylvania Railroad Company*, (1948) 332 U. S. 625, and *Dice* v. *Akron, Canton & Youngstown Railroad Company*, (1952) 342 U. S. 359, this Court set out the criteria applicable in determining the validity of releases in actions brought under the Federal Employers' Liability Act.

The opinion in the *Callen* case stated:

> "But until Congress changes the statutory plan the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." 332 U. S. p. 630.

The trial court's charge on the question of release in the present case went far beyond any of the standards enumerated by this Court in the *Callen* and *Dice* cases.

The charge outlined seven purported factors for the jury to consider and told the jury that if they found any one of them to exist, to set the release aside. No less than six of the seven were incorrect or misleading.

The second factor was "whether or not there was a misrepresentation of the facts". There was no evidence

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In *Tampa Transit Lines* v. *Corbin*, (1952) 62 So. 2d 10, the Supreme Court of Florida construed Florida Common Law Rule 39(b), which was the same as present Rule 2.6(b). The court held that where no charge conference had been held and therefore no chance to object to a charge given by the court on its own, the correctness of the charge could be raised on appeal without any objection at all in the lower court.

of any misrepresentation by the trustee or his agents. Even if there had been, the misrepresentation had to be of a material fact and there had to be reliance on it by Watts.

A letter was read to Watts (R. 331). His own testimony showed he did not understand that he would always have a boilermaker's job and knew in fact any job in the yards was subject to union seniority (R. 438, 446). Nothing else was said to him (R. 473). The release expressly negatived any promise of future employment as a consideration for signing it (R. 6). Watts read the release before he signed it (R. 437, 474). See *Camerlin* v. *New York Central R. Co.*, (1st Cir. 1952) 199 F. 2d 698, 701.

The third factor listed in the charge—whether there was a meeting of the minds or a mistake of fact that presented [*sic*] a meeting of the mind—flies in the face of the established law that unilateral mistake of fact is no ground for avoiding a release while mutual mistake is. *Callen* v. *Pennsylvania Railroad Co.*, *supra*.

The seventh goes even farther—giving the jury as a basis for setting aside the release a finding that "Mr. Watts was mistaken as to Mr. Paffe's [the claims adjuster's] intentions and understanding of this release".

The fourth factor is equally erroneous and misleading. There the trial judge stated that grounds for avoiding the release were findings either that the railroad "had superior knowledge and thus acquired undue advantage due to such superior knowledge" or that the parties "were not standing on an equal footing in the negotiation".

In the fifth factor the trial judge attempted to discuss fraud and stated that it would be a conscious attempt to mislead or could also be present if the jury found "the

parties were not standing on an equal footing in this transaction".

There was no foundation in the evidence for any finding of conscious attempt to mislead. Watts' own testimony shows this (R. 435, 473-474, 438, 446, 475). This statement about lack of "equal footing" was patently erroneous.

As a sixth factor to consider, the Judge told the jury to consider the amount of money paid in consideration for the release to see if they found it so grossly inadequate as to shock the moral sense of right and wrong.

At the trial, Watts claimed out-of-pocket damages totaling $4,380 (R. 610). Of this amount, $2,746.80 was for lost time (R. 345). Watts had been injured on December 1, 1954. He returned to work in the middle of July, 1955 (R. 479), and had worked since that time whenever his seniority permitted (R. 609, 451-453).

The total consideration for his signing the release was $6,116.26 (R. 346). The amount of the settlement could hardly be considered grossly inadequate. Watts himself had suggested the amount he wanted to be paid (R. 473).

CONCLUSION.

The charge on the question of comparative negligence was erroneous. The effect of giving it was to deny to petitioner the right to jury trial on a vital issue in the case. In noting exceptions to charges, petitioner complied with all existing requirements of the Florida Rules of Civil Procedure and actually went beyond them. In holding this insufficient the District Court of Appeal of Florida, Third District, did not point out what should have been done in addition to what was done except to say that the objection was not sufficiently pressed.

The objection was reasonably and seasonably made and was noted by the trial judge. Uniformity of interpretation of the FELA has long been a matter of concern to this Court. The present case falls within the main stream of the decisions of this Court in *Brown* v. *Western Ry. Co. of Alabama*, 338 U. S. 294, *Urie* v. *Thompson*, 337 U. S. 163, *Arnold* v. *Panhandle & Santa Fe Railway Company*, 353 U. S. 360, and is inconsistent with the principles enumerated in those opinions.

The charge on release also involves the question of uniformity of interpretation of the law in FELA cases. It goes far beyond and is inconsistent with the decisions of this Court in *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625, and *Dice* v. *Akron Canton & Youngstown Railroad Company*, 342 U. S. 359. It purports to set up criteria for avoiding a release that are clearly erroneous and unintelligible as well.

We respectfully submit that this petition for writ of certiorari should be granted.

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APPENDIX

APPENDIX A.

Title 45, United States Code, Section 51.

Liability of Common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Title 45, United States Code, Section 53.

Contributory negligence; diminution of damages.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

APPENDIX B.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM A. D. 1958

J. TURNER BUTLER AND WILLIAM A. HALLOWES, III, Trustees of the property of FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Appellant,

vs.

WILLIAM ALEXANDER WATTS,

Appellee.

CASE No. 57-12

Opinion filed May 20, 1958.

An Appeal from the Circuit Court for Dade County. J. Fritz Gordon, Judge.

Scott, McCarthy, Preston, Steel & Gilleland and Dwight Sullivan, for appellant.

Nichols, Gaither, Green, Frates & Beckham, for appellee.

CARROLL, CHAS., Chief Judge.

The appellant, Florida East Coast Railway Company, was defendant in an action for personal injuries brought by the appellee William A. Watts under the Federal Employees' Liability Act, 45 U.S.C.A., § 51, *et seq.* The trial resulted in a jury verdict for the plaintiff for $80,000 on which judgment was entered for the plaintiff. A motion

for new trial was denied, and this appeal was duly taken. The parties will be referred to from time to time as designated in the trial court.

The plaintiff was severely burned while working as a boiler maker in defendant's yard in Miami, in the course of making welding repairs inside a water tank in a diesel engine.

Plaintiff alleged that the place provided for him to work and the tools and equipment furnished were not reasonably safe. The defendant denied negligence, and pleaded a general release.

On consideration of the briefs and the record, and with the benefit of oral argument, this court concludes that the nine points raised by appellant, and the assignments of error upon which they are based, are without merit, and that appellant has failed in its burden to demonstrate error. On only three of these points do we find a need for discussion and comment in this opinion.

Under its point number one appellant assails a charge given by the court on the issues relating to the validity of the release. The charge on the subject of the release covered four pages of the typewritten record. The part quoted and challenged by the appellant was less than half of the full charge on the subject. In determining the correctness of the charge we looked not only at the portion which the appellant isolated, but examined and considered the entire charge given by the court. See *Police & Firemen's Ins. Ass'n v. Hines*, 134 Fla. 298, 183 So. 831, 833; *Wharton v. Day*, 151 Fla. 772, 10 So. 2d 417, 418; *Adams v. Royal Exchange Assur.*, Fla. 1953, 62 So. 2d 591, 595. On reading the complete charge on the subject it is found that the issues relating to the release were presented to the jury on proper and adequate charges by the court.

Appellant's second question contended that error resulted when the court, in charging the jury, omitted a portion of defendant's requested charge No. 20. That charge dealt with the comparative negligence rule as applicable under 45 U.S.C.A., § 53, which includes the provision, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The defendant's counsel submitted a written request for a charge on comparative negligence, in order to obtain the benefit, in the event of recovery by the plaintiff, of reduction in damages in proportion to the amount of negligence which might be found on the part of the plaintiff employee. The record discloses that defendant's requested charge No. 20 as presented to the court was as follows:

> "In this case, what is known as the law of comparative negligence applies. Thus the fact that the plaintiff may have been guilty of contributory negligence, if you should find that he was, will not prevent him from recovering if you also find that the defendant was guilty of negligence [proximately resulting in the injuries complained of]. However, you must reduce any award you may make by the amount that the negligence, if any, of the plaintiff contributed to his injury."

The record shows the brackets inserted as above. They indicated an amendment to the charge as made by the defendant, eliminating the wording "proximately resulting in the injuries complained of".

The record of the conference held pursuant to rule 2.6(b) of 1954 Florida Rules of Civil Procedure, between the court and counsel with relation to the charges out of the presence of the jury, shows that the court overruled

an objection of plaintiff's counsel to defendant's requested charge No. 20, and stated that the charge would be given as thus amended. On inspecting the charge given by the court as transcribed by the court reporter, it is seen that when the trial judge read this charge to the jury he stopped at the point where the brackets begin and he did not read the last sentence (evidently being under the impression, as he came to read it, that the brackets indicated elimination of the balance of the charge).

Thus counsel for the parties were confronted with a situation where the court, after having ruled that a certain requested charge would be given, left out the last sentence in delivering that charge.

Appellant argues that the failure of the court to include the part of the charge which would have informed the jury that they should "reduce any award you may make by the amount that the negligence, if any, of the plaintiff contributed to his injury", while charging them in effect that contributory negligence of the plaintiff, if they found such, would not prevent him from recovering, amounted to ch ging the jury that they should disregard any contributory negligence, and that therefore the verdict was not reduced as required because of plaintiff's negligence. The appellee argues in response that the charge to the jury that comparative negligence was applicable, together with an explanation of the reductio. feature as made by the appellant's counsel in his argument to the jury, sufficiently acquainted the jury with the information enabling them to arrive at a proper verdict according to the law on the subject.

Appellant's counsel answers that any benefit of such explanation to the jury by him was counterbalanced by the failure of the court to give such charge, after counsel

had told the jury that the court would so instruct them on that feature.

Although the court had granted the request to give the charge, his failure to give a part of it amounted to a denial of the request for that part. It seems obvious that the failure of the court to read the last sentence of the charge was inadvertent, and such occurrence was understandable because the brackets and markings which had been inserted ahead of the last sentence of the requested charge, could lead one reading it to assume that the last part was excluded.

Under those circumstances it was the duty of counsel to call such omission to the attention of the court in a manner in which the court would be duly informed of what had occurred, and thus would have an opportunity to submit or resubmit his charge to the jury with the sentence which had been left out, and which he had intended to give. No objection was made to this "denial" or omission to give the charge or part of the charge at the time it occurred, nor was the fact of the omission called to the court's attention at that time.

The record shows that after the giving of all charges was completed by the court, and after the jury had been sent by the court to the jury room, defendant's counsel made certain comments to the court respecting this matter, but that counsel's statements to the court were not sufficient to inform him adequately of what had happened. The following transpired with reference to this matter at the conclusion of the court's charge to the jury:

"THE COURT: You may retire, gentlemen, to consider your verdict.

(At 10:25 a.m., the jury retired to consider their verdict.).

"THE COURT: Let the record show that the same thing that I said previously about the objections goes here.

"MR. SULLIVAN: Your Honor, I have one question on this Charge 20.

"THE COURT: I have already said that you objected to all charges given and the charges not given as requested by you, and as requested by you, and you object to the charges as a whole. Do you have a special objection to that?

"MR. SULLIVAN: Your Honor, what I did yesterday was to amend this Charge 20 in part. I wanted to make clear in amending this Charge 20, I meant to leave in the last sentence.

"THE COURT: Yes.

"MR. FRATES: Judge, unless they ask for the exhibits, do you plan on sending them in?

"THE COURT: Yes. I always do. If they don't want them they don't have to use them.

"MR. SULLIVAN: Your Honor, is it all right if we withdraw these things marked for identification?

"MR. FRATES: Judge, if he will substitute photostatic copies of that particular file.

"THE COURT: Suppose we leave it until after the case.

"MR. FRATES: I have no objection if he substitutes photostatic copies.

"THE COURT: These are things that he did not introduce, were just marked for identification.

"MR. FRATES: I think they still might be part of the file. You will have it and anything will be available if we want it.

"MR. SULLIVAN: Yes.

"THE CLERK: Your Honor, the jury has asked for a yellow pad of paper.

"THE COURT: Will you see if you can get counsel? I just wanted you attorneys to know the jury has asked for a yellow pad of paper.

(At 2 o'clock p.m., the jury returned to the courtroom and the following proceedings were had:)

"THE COURT: Gentlemen, have you arrived at a verdict?

"THE FOREMAN: We have, your Honor."

It will be noted on examining the above quoted proceedings which occurred after the jury retired, that defendant's counsel mentioned the omission to the court but did not press the point, and his failure to sufficiently inform the court appears obvious. It is also disclosed that the plaintiff's counsel broke in with a change of subject, asking about the handling of exhibits, and that the conversation between court and counsel did not return to the question of the portion of charge No. 20 which the court had failed to give. See discussion of this problem in *Garrett* v. *Faust*, D. C. Pa. 1949, 9 F.R.D. 482, 486.

We are forced to conclude that no proper objection was made, and that the court was not duly informed or furnished with a request or opportunity to complete the charge, either while the jury was still present or by recalling them for that purpose.

Counsel for defendant is not to be criticized for failure to move the court to include the omitted portion of the charge, either before or after the jury retired, because such procedure is not well charted by precedent. However, that is no good reason upon which to base a demand for a retrial, when the situation could have been cured by counsel through the aforestated natural procedure.

By an appropriate amended assignment of error the appellant contends that the verdict was excessive. We disapprove the contention. Not much needs to be said on this question. At the time he was injured, the plaintiff Watts, who was 47 years old, had worked for the railroad for twenty years, and had a good reputation as a worker, hav-

ing risen from laborer to boiler maker, in which occupation he was earning more than $350 a month. Considering his earning ability, his position with the railroad and his good health, the future earnings reasonably to be expected of which he was deprived were easy to calculate. He was able to do light work but the source and length of such employment now became a matter of doubt. This man had suffered severe burns over an extensive portion of his body, with the results to him which necessarily followed and will follow such injuries. In addition, he suffered an emotional disability, assigned as being 25%, and he suffered other expenses, including past loss of earnings, in excess of $4,000.

This reference to his damage basis has not adequately described the circumstances of his injury, occurring by a searing fire in the confined recesses of a tank in the diesel engine where he was working, and of the area and the extent of the burns which he suffered, and the treatment he was required to take for those burns and the physical results of them. All such matters were before the jury. They saw the parties and heard the testimony and rendered their verdict thereon. The able circuit judge who had the same opportunity to hear and observe the witnesses which the jury had, put his stamp of approval on the verdict, when its excessiveness was suggested to him on motion for a new trial.

We say here, as said by the Supreme Court in *Sproule v. Nelson*, Fla. 1955, 81 So. 2d 478, 481:

> "There is an element of speculation in most personal injury verdicts, but this is a matter for jury discretion. The court may review their discretion but not the amount awarded unless shown to be clearly arbitrary."

Concluding as we do that the trial was conducted without error we affirm the judgment.

HORTON and PEARSON, JJ., concur.

APPENDIX C.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A. D. 1958

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, Trustees of the property of FLORIDA EAST COAST RAILWAY CO.,
Appellant,
vs.
WILLIAM ALEXANDER WATTS,
Appellee.

CASE No. 57-12

This cause having heretofore been submitted to the Court upon the original record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the appellee do have and recover of and from the appellant his costs which has been paid by appellant, and that all costs shall be taxed in the court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The opinion of the Court in this cause prepared by Judge Carroll was this day ordered to be filed.

APPENDIX D.

IN THE SUPREME COURT OF FLORIDA
JULY TERM A. D. 1958

TUESDAY, OCTOBER 28, A. D. 1958

J. TURNER BUTLER and WILLIAM A. HALLOWES, as Trustees of the property of the Florida East Coast Railway Company, a Florida corporation,
Petitioners,
vs.
WILLIAM ALEXANDER WATTS,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date of May 20, 1958 (Petition for Rehearing denied June 19, 1958, Minute Book 1, page 434) and filed in the records of said District Court on the 20th day of May, 1958, in Minute Book 1, page 381, and the record having been inspected, it is ordered that said petition be and the same is hereby denied.

A true copy,

TEST:
Guyte P. McCord
Clerk Supreme Court

APPENDIX E.

Excerpts from the Conference on Charges.

(R. 718-728:)

THE COURT: All right, gentlemen, let's take up Plaintiff's requested instructions first.

MR. SULLIVAN: Your Honor, I should state what our position is on this Release. I don't think the Release should be set aside. In cases cited, any number, it says: "through fraud or mutual mistake," and they don't mention if a fellow is mentally incompetent. I think you can set it aside for that reason, although I am a little more dubious about it, unless some inequity has been practiced on it. I don't think there was any mutual mistake. There may be a mistake by Mr. Watts, but I don't think there was any mistake by Mr. Paffe. When a case is a mutual mistake—verbally, the claim agent and the man get together and they rely on what the doctor testified to, "I don't anticipate anything wrong with the leg," and then two weeks later gangrene sets in and the man loses the leg. I don't think that enters into this matter as to fraud.

I agree with the charge that cases do seem to say it doesn't have to be deliberate or intentional on the part of the realtor, and I also think it is pretty clear in this case as to what was said. The only evidence is that Paffe said he told Watts about the letter, and Watts isn't sure just what Paffe said. He doesn't recall the words, and it is just a misunderstanding. I don't think there is a case of any lifetime proposition. The man came in and said, "Definitely, he promised me a lifetime job."

I think the facts are pretty well established as to Watts' condition. Certainly, Dr. Morgan's testimony said, "Well, if he was in the shape he was in, he was all right to go to work; but wasn't in good shape to make a serious business decision." I have some doubts. Was he mentally incompetent at that point? I don't think there is any evidence that he was. Certainly, the evidence from Dr. Morgan was that he wasn't as well as before, or could have been.

THE COURT: Let's take up paragraph one of Plaintiff's Charge No. 2.

MR. SULLIVAN: We submitted a charge on it, your Honor. No. 7 deals with, or seems to get pretty close to the same thing, I think.

THE COURT: Practically the same.

The second paragraph is practically the same as the other one he has there.

MR. SULLIVAN: All right, subject to our overall motions, we won't object to sub-paragraph one.

THE COURT: Let's look at paragraph No. 2.

MR. SULLIVAN: I think that is covered by this claim of fraud down below here. If it is a misrepresentation of fact, that is what fraud is.

MR. FAY: Your Honor, we separated those, because we felt it would be clearer to the jury if we distinguished between the difference of misrepresentation and bad faith, and this other type of fraud that can arise. That is why No. 2 is set aside separately. That in and of itself is conscious bad faith, which is positive misrepresentation by the railroad, and which are grounds in and of itself to vacate this release. That is why it was set aside. I agree it is a type of fraud and that is the reason we set it aside.

This paragraph is the only way we figured it would be clear and distinguishable from the other type of fraud.

I don't think the jury will understand what is meant when they said, "If you find fraud, you can vacate this release." Fraud encompasses statements in its legal sense.

THE COURT: Fraud could be intent to mislead or misrepresent the terms of the lease. It is a repetition of No. 2.

No. 5, in part, reads: "Fraud could be an attempt to mislead or misrepresent the actual terms of the release."

MR. FAY: All right, sir.

THE COURT: It is exactly the same thing.

MR. FAY: It probably is.

THE COURT: I will leave No. 2 out and use No. 5.

Paragraph No. 3—Meeting of the Minds. I think there is a case on that.

MR. SULLIVAN: I want to object to No. 3. If you talk about meeting of the minds, and the fellow later came in and said, "That was my understanding." I think he is bound by the words used—recognized by the courts as objective rather than subjective.

MR. FAY: In that regard, I don't believe there is any conflict in the testimony in this case, but at the time this agreement was executed, there was no meeting of the minds, from the testimony of Mr. Paffe—what he understood it was, and the testimony of Mr. Watts—what he thought at the time it was executed, and not later.

I think that is very applicable, and I think that is exactly what the cases mean—you can't have a contract unless the essential element is that the minds met. Without that, you have no contract.

THE COURT: (Reading) "did not testify to any act of misrepresentation of fact. It was obvious, from a viewpoint, that there was no meeting of the minds and, therefore, was not held bound by the release."

I will give it along with other of the charges.

Paragraph No. 4.

MR. SULLIVAN: We object to No. 4. I don't think there is evidence to justify that charge in this case. Superior knowledge—I think that came out of a case where there had been representation by the claim agent what his legal rights were. You also have rights under the Workmen's Compensation Law purported to represent something to him on a legal basis. I don't think there is any representation on that.

MR. FAY: I think the evidence is pretty clear about the advantage Mr. Paffe had over Mr. Watts in this transaction. He was dealing with an injured employee, who was anxious to go back to work, and wanted assurance of future employment. He didn't even hand Mr. Watts this letter, but verbally read from it, and he was in a position to have all the facts, and was forced to rely upon Mr. Paffe. That was the only source of information that Mr. Watts had at the time this release was executed. The courts have repeatedly used the phrase, "Standing upon equal footing."

THE COURT: I am willing to give the second part, but am worried about the first part—evidence due to his superior knowledge.

MR. FAY: Yes, Mr. Paffe was the one that had the letter and knew of Mr. Watts wanting—the only thing he was concerned with. Mr. Watts said, "I want future employment." Mr. Paffe was the only one of those parties that had any knowledge about future employment. Mr. Watts had to rely on him completely. Mr. Paffe didn't even show him the letter from Mr. Gammon, wouldn't allow him to read it.

THE COURT: You say, "Due to his superior knowledge:" Superior knowledge of what?

MR. FAY: Combination. Only one had knowledge of the future—experienced claims adjuster worked for the

railroad; he knew the situation. The employer had superior knowledge of what could be done; knew in executing the release whether it would be valid or not from his experience and training.

THE COURT: Couldn't you argue that, under the second point, "whether or not the parties were standing upon equal footing in the negotiation."

MR. FAY: I think that is all part of it. I think that is what undue advantage is, superior knowledge.

THE COURT: The wording there is what I am talking about.

MR. FAY: We have tried to extract that wording from cases we cited, your Honor, and feel it fits the evidence in this case right down the line.

THE COURT: The first point, but not the second point, "whether or not the parties were standing upon equal footing in their negotiations." I follow that. That will give you an opportunity to argue what you want to about that, but at the same time, I don't like to impose my knowledge, and say to the jury, that it was a superior knowledge. Do you get what I am doing when I virtually say that?

MR. FAY: I understand that, your Honor, and that is the evidence in the case.

THE COURT: I don't think so.

MR. FAY: All the evidence in the case is that Mr. Paffe, an experienced adjuster, did it for the railroad, and he was the only one who had knowledge concerning future employment.

THE COURT: I still say you can argue it under that second part.

MR. FAY: But, your Honor, that is all part of it.

THE COURT: Why give both of them then, if it is all part of it?

MR. FAY: I think that is what it is. You say you object to the language of the superior knowledge, and you are saying to the jury, "If you find this is the case—that that was the condition that existed—then the release can be vacated." You are not telling them he had superior knowledge. Whether or not the railroad, through its claim agent, had superior knowledge and thus acquired an undue advantage."

MR. SULLIVAN: Note my objection to No. 4.

THE COURT: Let's take up paragraph 5.

MR. SULLIVAN: No. 5 pertains to fraud. This last part about inadequate consideration—this isn't where they slipped him $10.

MR. FAY: I think that is for the jury as to whether or not it is grossly inadequate. What we are saying, that is grounds, and I think it is up to the jury to say whether it is grossly inadequate.

THE COURT: Again, in that, we are giving the same thing as we gave in No. 4.

MR. FAY: Your Honor, I believe these are entirely separate.

THE COURT: Just read it.

"—if you believe from the evidence that the railroad obtained this release through an undue advantage or that the parties were not standing upon an equal footing in the transaction."

MR. FAY: I am sorry. I thought you were on No. 6. We will strike that out.

THE COURT: You keep me repeating over and over, and I think that is important to a jury, if you keep telling them something.

MR. FAY: Why don't we strike "Fraud can likewise be present." That's the idea we are trying to get across, which, I think, is the law.

THE COURT: I think I had better give that portion of it, in view of what I am saying in the other part. Maybe we can cut out No. 4 and give this in 5.

MR. FAY: Include No. 4 in No. 5.

THE COURT: I don't want to repeat myself; that is what I am trying to avoid.

MR. FAY: Well, sir, maybe we should insert No. 4 before that phrase and have it read, "Fraud can likewise be present without finding any conscious bad faith on the part of Mr. Paffe in this transaction. If you find the railroad, through its claim agent, had superior knowledge and thus acquired undue advantage—if you believe from the evidence that the railroad obtained this release through undue advantage, or that the parties were not standing upon equal footing in the transaction."

MR. SULLIVAN: One is repetitious of the other.

THE COURT: I wouldn't give that part of it, for your sake, unless I gave the second part. If I didn't give that, I would be doing wrong.

I am going to give down to the word—"Fraud can likewise be present."

MR. FAY: We tried to make this clear by saying, "was so grossly inadequate" We are not even asking for a charge—

THE COURT: I am talking about the wording, "Fraud can likewise be present." I don't think that is the proper wording.

MR. FAY: Maybe we should say "fraud," or just say, "If you find from the evidence that the consideration or money given by the railroad for this release was so greatly inadequate—this amounts to fraud"; leaving out the term "Fraud can likewise be present," and start with the word, "If" and then say "release should be vacated."

THE COURT: Strike out the phrase, "Fraud can likewise be present" and start off with, "If you find from the evidence * * *."

MR. FAY: "The release should be vacated."

THE COURT: Now, let's look at 6.

MR. FAY: I agree with Mr. Sullivan, the courts talk about the difference between unilateral mistake and mutual mistake. Only two parties to the release. Mr. Paffe said, "I knew we couldn't guarantee the man future lifetime employment." I knew, and my understanding was this—when Mr. Watts comes up, the only thing he is worried about is future employment, and he said, "My understanding was this"—the only thing he was worried about was future employment.

I don't see how we have anything under these facts, you can't have unilateral—taking the physician or doctor. On unilateral terminology, you have two parties talking back and forth, negotiating across the board. One said this, and the other one this; and one said, "No, this is exactly what I meant or understood." We either have mutual mistake here—two parties to this release here and they are bickering back and forth, and no doubt that Mr. Paffe comes in and says what he meant.

MR. SULLIVAN: I think the best argument, if a mistake, it is clearly unilateral. We thought this was so, and it turned out not to be so. Watts had an impression of something that isn't shown in this release. Mr. Paffe came in and inserted the release into the negotiations. Mr. Paffe said he had the release, from the letter.

THE COURT: The letter doesn't say anything.

MR. FAY: The letter says he can work until he fully recovers. That is what the letter says, reading the letter in evidence; no doubt about it. The letter says, "until he fully recovers."

I asked what "until he fully recovers" meant. That is what the letter says, and it is in evidence, "until he fully recovers." That is what Mr. Watts was concerned with, future employment.

THE COURT: I will give both of them then.

MR. SULLIVAN: Note objection to No. 2.

(R. 737-738:)

MR. SULLIVAN: As to 20, I would like to change this charge, as requested, and submit it in the form it is through "if you also find the defendant is guilty of negligence," and omit the remaining words in that sentence.

MR. FAY: Your Honor, this is raising something that should have been raised in the pleadings. In Florida, when contributory negligence is an affirmative defense, it should be raised; and the file will show the railroad did not raise the defense of contributory negligence in this case.

MR. SULLIVAN: It comes up under the statute. It is relevant to damages.

THE COURT: In view of comparative negligence, don't you think that is so.

MR. FAY: I was always under the impression it had to be pleaded.

MR. SULLIVAN: In the third line, beginning with the words "proximately resulting in the injuries complained of," an objection, I think, is proper. It seems it would make it easier for the railroad to get out unless you delete those words.

MR. FAY: We certainly object to that charge, your Honor, and if I felt a charge on contributory negligence was warranted, or comparative negligence, I would agree to this charge, but I do object to it strenuously, because there is no evidence whatsoever dealing with any contributory negligence in this case.

THE COURT: I am going to give it.

(R. 739:)

THE COURT: I think mine is better. They object to a portion of that other that I will not give.

Let the record show that Plaintiff objects to those instructions not given, as requested by him, and objects to those of Defendant, which I am giving, all of them.

Let the record also show that Defendant objects to those I am giving on behalf of the Plaintiff, and objects to my not giving the ones he has requested.

Let the record also show that both sides object to the general charges, and all other charges given by the Court

Excerpts from the Proceedings After the Jury Retired.

(R. 829-830:)

THE COURT: Let the record show that the same thing that I said previously about the objections goes here.

MR. SULLIVAN: Your Honor, I have one question on this Charge 20.

THE COURT: I have already said that you objected to all charges given and the charges not given as requested by you, and as requested by you, and you object to the charges as a whole. Do you have a special objection to that?

MR. SULLIVAN: Your Honor, what I did yesterday was to amend this Charge 20 in part. I wanted to make clear in amending this Charge 20, I meant to leave in the last sentence.

THE COURT: Yes.

Excerpts from Motion for New Trial.

Defendant moves the Court to set aside the jury's verdict herein and to enter final judgment for defendant in accordance with his motion for a directed verdict made at the

close of all the evidence, or, in the alternative moves the Court to grant defendant a new trial on the following grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is contrary to the manifest weight of the evidence.

14. The Court erred in refusing to instruct the jury in accordance with defendant's requested instruction No. 20.

22. The Court erred in instructing the jury as follows:

"Therefore, the first issue for you to decide in this case concerns the question of the release. In determining this issue, you may consider,

1. The mental condition of Mr. Watts at the time the release was signed.

If you find from the evidence that his mental condition was such that he did not understand the nature and effect of signing such release, then the release is not valid and should be set aside as it is not binding on him.

2. Whether or not there was a misrepresentation of the facts.

3. Whether there was a meeting of the minds of Mr. Watts and the railroad acting through its Claim Agent, or whether there was a mistake of fact that presented [*sic*] a meeting of the mind.

4. Whether or not the Railroad, through its Claim Agent, had superior knowledge and thus acquired undue advantage due to such superior knowledge, and whether or not the parties were standing upon equal footing in the negotiation.

5. Whether or not the alleged release was obtained through fraud on the part of the railroad, or its agents or employees. Fraud could be an attempt to mislead or misrepresent the actual terms of the release, and to attempt to convince Mr. Watts that his future employment was protected. Fraud can likewise be present without finding any conscious bad faith on the part of Mr. Paffe in this transaction, if you believe from the evidence the railroad obtained this release through an undue advantage or that the parties were not standing upon an equal footing in this transaction.

6. If you find from the evidence that the consideration of money given by the Railroad for this release was so grossly inadequate, in view of the injuries sustained, or so inadequate as to shock the conscience or the moral sense of right and wrong, you may take this into consideration in determining if any fraud was present.

7. That the parties were mistaken as to the terms of the release, or that Mr. Watts was mistaken as to Mr. Paffe's intentions and understanding of this release, or that both parties were mistaken as to its understandings.

If you find that any one or all of the conditions enumerated above have been proven by a preponderance of the evidence to have existed at the time this release was executed or signed, you should find for Mr. Watts on this issue, and then turn to the question of negligence on the part of the railroad."

26. The Court erred in instructing the jury as follows:

"In this case, what is known as the law of comparative negligence applies. Thus the fact that the plaintiff may have been guilty of contributory negligence, if you should find that he was, will not prevent him from recovering if you also find that the defendant is guilty of negligence."

Excerpts from Assignments of Error.

Defendant assigns as error to be relied on by him as Appellant in the District Court of Appeal, Third District, for the reversal of the judgment entered in the above-styled cause the following:

1. The Court erred in entering final judgment for plaintiff.

2. The Court erred in denying defendant's motion for new trial.

3. The Court erred in denying defendant's motion to set aside verdict and for entry of final judgment for defendant.

6. The verdict is contrary to the law.

7. The verdict is contrary to the evidence.

8. The verdict is contrary to the law and the evidence.

9. The verdict is contrary to the manifest weight of the evidence.

19. The Court erred in refusing to instruct the jury in accordance with defendant's requested instruction No. 20.

27. The Court erred in instructing the jury as follows:

"Therefore, the first issue for you to decide in this case concerns the question of the release. In determining this issue, you may consider,

1. The mental condition of Mr. Watts at the time the release was signed.

If you find from the evidence that his mental condition was such that he did not understand the nature and effect of signing such release, then the release is not valid and should be set aside as it is not binding on him.

2. Whether or not there was a misrepresentation of the facts.

3. Whether there was a meeting of the minds of Mr. Watts and the railroad, acting through its Claim Agent, or whether there was a mistake of fact that presented [*sic*] a meeting of the mind.

4. Whether or not the Railroad, through its Claim Agent, had superior knowledge and thus acquired undue advantage due to such superior knowledge, and whether or not the parties were standing upon equal footing in the negotiation.

5. Whether or not the alleged release was obtained through fraud on the part of the railroad, or its agents or employees. Fraud could be an attempt to mislead or misrepresent the actual terms of the release, and to attempt to convince Mr. Watts that his future employment was protected. Fraud can likewise be present without finding any conscious bad faith on the part of Mr. Paffe in this transaction, if you believe from the evidence the railroad obtained this release through an undue advantage or that the parties were not standing upon an equal footing in this transaction.

6. If you find from the evidence that the consideration of money given by the Railroad for this release was so grossly inadequate, in view of the injuries sustained, or so inadequate as to shock the conscience or the moral sense of right and wrong, you may take this into consideration in determining if any fraud was present.

7. That the parties were mistaken as to the terms of the release, or that Mr. Watts was mistaken as to Mr. Paffe's intentions and understanding of this release, or that both parties were mistaken as to its understandings.

If you find that any one or all of the conditions enumerated above have been proven by a preponderance of the evidence to have existed at the time this release was executed or signed, you should find for Mr. Watts on this issue, and then turn to the question of negligence on the part of the railroad."

31. The Court erred in instructing the jury as follows:

"In this case, what is known as the law of comparative negligence applies. Thus the fact that the plaintiff may have been guilty of contributory negligence, if you should find that he was, will not prevent him from recovering if you also find that the defendant is guilty of negligence."

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FILED
FEB 12 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 666

J. TURNER BUTLER & WILLIAM A. HALLOWES,
As Trustees of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation,
Petitioners,

vs.

WILLIAM ALEXANDER WATTS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM S. FRATES,
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Miami, Florida
Attorney for Respondent.

IN THE

Supreme Court of the United States

No. 666

J. TURNER BUTLER & WILLIAM A. HALLOWES, As Trustees of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation,

Petitioners.

vs.

WILLIAM ALEXANDER WATTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Florida District Court of Appeal, Third District, is reported at 103 So. 2d 123. The order of the Florida Supreme Court denying certiorari is reported at 106 So. 2d 200.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

QUESTIONS PRESENTED

Petitioner presents two questions:

1. Whether the Florida rule of appellate procedure,

requiring litigants to call clearly and distinctly to the trial judge's attention, mistakes made in reading jury instructions, constitutes an unreasonable obstacle to the assertion of a railroad's rights under the Federal Employers' Liability Act, 45 U. S. C. Section 51 et. seq.

2. Whether the court below erred in holding that the charges as a whole fairly submitted the issues regarding voidability of a release under the Federal Employers' Liability Act, 45 U. S. C. Section 51 et. seq.

STATUTES INVOLVED

The relevant sections of the Federal Employers' Liability Act are set out in Appendix A of the Petition.

STATEMENT

Respondent recovered an $80,000 verdict and final judgment against Petitioners in an action under the Federal Employers' Liability Act. On this Petition, the only matters of significance are the jury charges on comparative negligence and voidability of the release.

The incident regarding the comparative negligence charge is set out in full in the District Court of Appeal's decision at 103 So. 2d 124-127. The trial judge charged that "the doctrine of comparative negligence applies", but inadvertently failed to read the last sentence of Petitioners' requested instruction regarding reduction of damages in proportion to Respondent's fault. The only thing counsel for Petitioners did to call this mistake to the trial court's attention was to state:

"Your Honor, what I did yesterday was to amend this Charge 20 in part. I wanted to make clear in amending this Charge 20, I meant to leave in the last sentence." (R. 829-830)

The trial judge was not informed that he had omitted a portion of a charge that he had ruled he would give. He was not even told that the comparative negligence charge was the one involved; and, finally, the trial judge was not told that he had failed to define the "doctrine of comparative negligence."

Florida appellate practice, like that of nearly all jurisdictions, precludes a re-trial where the defect complained of on appeal could have been cured by fairly calling the matter to the trial judge's attention. Consequently, when faced with the present record, the court below held:

"We are forced to conclude that no proper objection was made, and that the court was not duly informed or furnished with a request or opportunity to complete the charge, either while the jury was still present or by recalling them for that purpose." 103 So. 2d, at 126.

In the charges concerning the release issue, Petitioners do not even mention what was actually held below. The holding below was as follows:

"Under its point number one appellant assails a charge given by the court on the issues relating to the validity of the release. The charge on the subject of the release covered four pages of the typewritten record. The part quoted and cha-

lenged by the appellant was less than half of the full charge on the subject. In determining the correctness of the charge we looked not only at the portion which the appellant isolated, but examined and considered the entire charge given by the court. See Police & Firemen's Ins. Ass'n v. Hines, 134 Fla. 298, 183 So. 831, 833; Wharton v. Day, 151 Fla. 772, 10 So. 2d 417, 418; Adams v. Royal Exchange Assur., Fla. 1953, 62 So. 2d 591, 595. On reading the complete charge on the subject it is found that the issues relating to the release were presented to the jury on proper and adequate charges by the court." 103 So. 2d at 124.

The "four pages" of instructions on releases include the following charges which were given at Petitioners' request:

"You are instructed that the release introduced in evidence in this case is on the face of it broad enough to cover all claims W. A. Watts may have arising out of the injuries he received in December, 1953. If you find that W. A. Watts when he signed the release understood what he was doing and knew that he was releasing the defendant Trustee from all claims, then he is bound by it and cannot recover in this case.

I charge you that there is a difference in the law from what is called unilateral mistake and what is called mutual mistake. Unilateral mistake is a mistake by one of the two parties to an agreement as to the nature or contents of the agreement. Mutual mistake is such a mistake or

misunderstanding by both parties. A unilateral mistake is not a defense to an agreement or release.

One of the issues raised in this case is that of Mr. Watts' mental condition and competency at the time he entered into settlement negotiations with Mr. Paffe in July, 1954. On this issue, I charge you that there is in all cases a presumption of sanity.

The Plaintiff in this case, W. A. Watts, has asserted the claim that the release he signed is invalid. I charge you that the burden is upon the plaintiff to prove by a preponderance of the evidence that the release in this case was obtained by fraud or mutual mistake of fact." (R. 818-819)

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that this Petition should be denied for the following reasons:

1. The decision below is of no importance whatsoever beyond the facts of the particular case.

2. The decision below is not in conflict with the decisions of any other court.

3. The Florida rule requiring litigants to state clearly and distinctly their objections and requests as to jury instructions preserves rather than obstructs federal rights by making is impossible to "sneak error into the record."

4. The charges on the release issue state the law in accordance with this Court's decisions on the point. E.g. DICE v. AKRON, CANTON & YOUNGSTOWN R. CO. 342 U.S. 359.

CONCLUSION

It is respectfully submitted that the Petition should be denied.

WILLIAM S. FRATES
448 Pan American Bank Building
Miami, Florida
Attorney for Respondent.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Respondent's Brief in Opposition has this _____ day of _____ 1959, been delivered to George F. Gilleland, 657 Ingraham Building, Miami, Florida, Attorney for Petitioners.

WILLIAM S. FRATES

LE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

No. 666.

J. TURNER BUTLER & WILLIAM A. HALLOWES, as Trustees of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, *Petitioners*,

vs.

WILLIAM ALEXANDER WATTS, *Respondent*.

REPLY BRIEF OF PETITIONERS.

GEORGE F. GILLELAND,
627 Ingraham Building,
Miami 32, Florida,
Attorney for Petitioners.

2-23-59—50

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ARGUMENT.

POINT ONE.

The Court's Instruction on Comparative Negligence.

Respondent refers to a "Florida rule of appellate procedure requiring litigants to call clearly and distinctly to the trial judges' attention mistakes made in reading jury instructions." (Resp. Br. 2-3).

The only published rule dealing with the question is Rule 2.6(b), Florida Rules of Civil Procedure, which we

set out in our main brief (Br. 11). The only other "rule" is such "rule" as may be distilled from the opinion of the District Court of Appeal of Florida, Third District, in this case.

(See discussion in footnote 1, pp. 11-12 of our brief.)

Respondent admits the error in the charge but claims it was not called to the lower court's attention. Actually the requirements of Rule 2.6(b), Florida Rules of Civil Procedure, were fully complied with at the conference on charges (R. 739). The exceptions required by this rule were again noted by the trial judge himself immediately after the jury retired (R. 829).

Counsel then told the judge that, in amending Defendant's Requested Charge No. 20 at the conference on charges he had left in the last sentence. The Judge said he understood this (R. 830).

In the light of this, respondent's claims that the judge was not advised what charge was involved (Resp. Br. 3) and that petitioners seek to "sneak error into the record" (Resp. Br. 5) seem strained. The judge had just finished reading from the requested charges which were separately numbered (R. 140-180) and which had been referred to by number throughout the conference on charges.

The charges were in front of the judge when the omission was called to his attention. He asked if counsel had a special objection as to Charge No. 20 and when advised of it said he understood it (R. 830).

Had the last sentence in Charge No. 20 been given there would have been no need to make the objection to the court. Unless the last sentence of Charge No. 20 had been omitted, the objection would have been meaningless.

Respondent further claims that this case is of no importance beyond the facts of the particular case (Resp.

Br. 5). The answer to this assertion is that the statute under which the case was brought says that contributory negligence is a partial defense; the opinion of the appellate court in this case says an instruction that it is no defense at all is not cause for reversal.

POINT TWO.

The Charge on Release.

In seeking to uphold the charge on release, respondent cites that part of the opinion of the District Court of Appeal of Florida, Third District, which states that all of the charges on release took up four pages of the record and the charge upon which we seek review less than half of that.

The implication from respondent's brief is that the other charges on the question of release in some way rendered harmless the parts of the charge objected to here.

The Record shows that the charge objected to covers pages 816, 817 and part of 818. The other instructions dealing with release are set out on the remainder of page 818, the top of page 819 and the first two paragraphs of page 820.

Upon analysis, these other instructions deal with the following:

1. Burden of proof in setting aside release (bottom R. 818 and top of R. 819).
2. Presumption of sanity—(third paragraph R. 818).
3. Explanation of mental state necessary to execute a release—(first paragraph R. 818).
4. Settlement not to be considered an admission of liability (first two paragraphs, R. 820).

5. Unilateral mistake distinguished from mutual mistake (second paragraph R. 818).

We did not object below to sub-paragraph 1 of the charge upon which we seek review—that part dealing with mental competency. The other charges dealing with this (R. 818) in no way affect the parts of the charge we did object to.

The same is true as to the charge on burden of proof in setting aside a release (R. 818-819) and the charge that a settlement is not to be considered an admission of liability (R. 820). They in no way cured the charge objected to.

Of the five "other" charges, then, only one in any way overlapped the charge objected to. That was the charge dealing with the difference between unilateral and mutual mistake (R. 818).

That instruction stated that unilateral mistake was not ground for setting aside a release but that mutual mistake was (R. 818). Sub-paragraph 7 of the charge objected to told the jury that they could set aside the release if they found either (1) the parties were mistaken *or* (2) Watts (the respondent) was mistaken as to what Paffe (the claims adjuster) thought (R. 817).

This "other" charge contradicted the earlier charge in part. Rather than curing the originally erroneous instruction, it only confused the matter further, if that is possible.

CONCLUSION.

We respectfully submit that this petition for writ of certiorari should be granted.

GEORGE F. GILLELAND,
627 Ingraham Building,
Miami 32, Florida,
Attorney for Petitioners.

PROOF OF SERVICE.

I hereby certify that a copy of Reply Brief of Petitioners filed in this cause was served upon respondent pursuant to Rule 33(1), Revised Rules of the Supreme Court of the United States by depositing a copy of such petition in a United States mail box, with first-class postage prepaid, addressed to counsel of record for respondent, Mr. William S. Frates, at his post office address, 448 Pan American Bank Building, Miami 32, Florida, this day of February, 1959.

GEORGE F. GILLELAND,
Attorney for Petitioners.